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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Review of the Commission's	)	
Broadcast and Cable Equal	)	
Employment Opportunity	)	MM Docket No. 98-204
Rules and Policies and	)	
Termination of the EEO	)	MM Docket No. 96-16
Streamlining Proceeding	)	

REPLY COMMENTS of Americans United for Separation of Church and State to the Comments of the Christian Legal Society's Center for Law and Religious Freedom, Concerned Women for America, and Focus on the Family

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Counsel:

Julie A. Segal, Esq.
Americans United for Separation of Church and State
1816 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 466-3234

April 14, 1999

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Introduction and Summary

Americans United for Separation of Church and State ("Americans United") submits the following Reply Comments in the above-captioned proceeding.[1]

The Christian Legal Society's Center for Law and Religious Freedom, Concerned Women for America, and Focus on the Family ("CLS") submitted Comments urging the Commission to adopt a broader definition of "religious broadcaster" than the Commission's proposed definition in the modification of Section 73.2080.[2] Americans United partially agrees with the CLS Comments that the definition may be more narrow than is necessary to

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[1] Americans United filed Reply Comments in the Matter of Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines, MM Docket No. 96-16, on August 12, 1996.

[2] Comments of the Christian Legal Society, Concerned Women for America and Focus on the Family, MM Docket No. 98-204 (filed March 1, 1999) [hereinafter CLS Comments].

achieve the Commission's goals of promoting diversity and eradicating employment discrimination in the broadcast industry. Americans United disagrees, however, with most of the rationale utilized to reach their conclusion.

Most significantly, Americans United strongly differs with CLS's proposed expansion of the Commission's rule that would allow *commercial* broadcasters to discriminate in their employment on the basis of religion. This proposal exceeds current law in that discrimination is only permitted in the *nonprofit* activities of religious employers. The amendment of the Commission's proposed rules sought by CLS is therefore contrary to what is currently allowed under Title VII and by the U.S. Supreme Court.

The Commission's proposed rules strike a careful balance between religious liberty protections and the "public interest" in promoting increased access to broadcast industry opportunities for all Americans. The expansion of the religious exemption proposed by CLS to commercial broadcasters could disrupt this balance and impair the Commission's efforts to promote civil rights and diversity in the broadcast industry. Accordingly, because the Commission's proposal already appears to recognize the distinction between commercial and non-commercial broadcasters, these Reply Comments primarily seek to elucidate the misleading analysis conveyed in the CLS Comments.

Discussion

A.
A Rule Allowing Religious Discrimination by All Religious Broadcasters Exceeds Current Law.

The Commission has obviously made significant efforts to include a considerable number of broadcasters in its proposed definition of "religious broadcaster." By defining "religious broadcaster" to include all broadcasters that are "affiliated with a church, synagogue, or other religious entity" and that do not operate "for-profit," the Commission has reached a large number of broadcasters. The CLS Comments, however, urge the Commission to adopt a new rule requiring that *all* religious broadcasters, including those with commercial stations, be permitted to discriminate on the basis of religion in their employment for *all* jobs. Their stated rationale for this new rule is that "[a] religious broadcaster's First Amendment rights do not hinge on whether it operates on a non-profit basis."[3] This rationale is flawed on at least two levels.

First, CLS's statement implies that religious broadcasters have a right under the First Amendment to discriminate on the basis of religion in their employment. This right does not exist. The Supreme Court has not acknowledged any Free Exercise protection for religious organizations in hiring beyond those employees engaged in the organization's ministerial function.[4] The CLS Comments also ignore the distinction between Title VII, which is a civil

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[3] *Id.* at 22.

[4] *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 325, 337 (1987).

remedy for the deprivation of a statutory right, and the Commission's EEO rules, which are regulations governing a public trustee who is granted a federal license. Second, the CLS Comments fail to acknowledge the limited scope of the 1972 amendment to Title VII[5] as interpreted in *Corporation of the Presiding Bishop v. Amos*[6].

1. There is No First Amendment Right to Discriminate

In *Amos*, the Supreme Court held that the expansion of the religious exemption in Title VII did not violate the religion clauses of the First Amendment.[7] However, in reaching that holding, the Supreme Court did not find that religious organizations had a Free Exercise right to hire only co-religionists for all jobs. However, the CLS comments attempt to imply such a right by utilizing clever, yet misleading, language such as "religious liberty interest."[8] A religious liberty interest is not equivalent to a Free Exercise right under the Constitution, and there is clearly no First Amendment right to discriminate outside the ministerial context.

In addition, religious broadcasters, unlike other religious organizations, are granted the benefit of an FCC license to act as public trustees. A broadcast license is essentially a privilege to use the publicly-owned airwaves in return for the duty to serve the public

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[5] 42 U.S.C. sec 2000e-1. The amendment exempted religious organizations from Title VII's prohibition against religious discrimination in any employment. Prior to Congress's amendment, Title VII's exemption applied only to employees who performed "work connected with the carrying on by [the organization] of its activities."

[6] *Amos*, 483 U.S. at 340.

[7] *Id.*

[8] CLS Comments at 8, 23.

interest. As public trustees, the government has subjected religious broadcasters to regulation that would not be permitted outside the broadcast context. Broadcasters, in order to obtain a license to utilize the airwaves, must abide by their pledge, as an FCC licensee, to uphold the public interest in the operation of their stations. This "public interest" includes promoting equal opportunity and diversity in broadcast employment. In this case, limiting a commercial broadcaster's ability to discriminate on the basis of religion is not a substantial burden on commercial religious broadcasters, but a uniform requirement of all public trustees to act in the public interest.

Therefore, although some religious broadcasters may be accommodated and, in some cases, permitted to employ only co-religionists, they do not have the *right* to employ all employees solely on the basis of religion. The Commission's proposed definition that includes only those religious broadcasters that do not operate "for-profit" achieves this balance between accommodating religion and the "public interest."

2. Title VII is Limited to Non-Profit Religious Organizations

The Supreme Court in *Amos* took special care to emphasize that the holding was limited to the *nonprofit* activities of religious employers.[9] In fact, several Justices emphasized that their decision did not address profit-making activities conducted by religious organizations.[10]

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[9] *Amos*, 483 U.S. at 340.

[10] *Id.* at 341 (Brennan, J. and Marshall, J., concurring), 347 (Blackmun, J., concurring), 350 (O'Connor, J. concurring).

This distinction by the Supreme Court between nonprofit and commercial activities of religious employers was not mentioned in the CLS Comments. The amendment to the Commission's EEO rules sought by CLS would nevertheless include commercial stations and allow them to discriminate in the hiring of all of their employees on the basis of religion. This proposed change in the rule would exceed what is permitted by the Supreme Court under Title VII. Therefore, contrary to the assertion in CLS's Comments, the "for-profit" or "non-profit" status of the broadcaster *should* be determinative in its designation as a religious broadcaster.[11]

B.

The Proposed Definition of "Religious Broadcaster" May be More Narrow than Necessary

Although the Commission has extended the definition of "religious broadcaster" to a large number of broadcasters, it nevertheless appears that the proposed definition may be more narrow than is necessary. Americans United agrees with CLS's Comments that the proposed requirement that a broadcaster be "affiliated with a church, synagogue, or other religious entity" may exclude those religious broadcasters that have no affiliation with any recognized religious groups or denominations.[12] For example, the definition may not encompass a non-denominational, non-profit broadcaster that devotes the majority of its air time to religious programming and purposefully articulates a religious mission. Americans

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[11] *See* CLS Comments at 3.

[12] *See id.* at 20.

United, therefore, leaves open the possibility that some legitimate non-profit religious broadcasters could be excluded by the proposed definition and encourages the Commission to consider amending its proposed definition.[13]

Although Americans United agrees with CLS on this point, we do not agree with the remainder of their Comments. First, CLS is quick to condemn discrimination on the basis of race and gender as somehow different from discrimination on the basis of religion.[14] Their Comments fail to mention, however, that employment discrimination on the basis of religion could also include discrimination on the basis of the employee's adherence to the organization's religious tenets and teachings.[15] For example, in *Boyd v. Harding Academy*, an unmarried female teacher was fired when the religious school for which she worked discovered that she was pregnant.[16] Because the school observed the tenet of abstinence, her termination was upheld as a permissible dismissal on the basis of religion.[17] Therefore, religious discrimination could encompass, among other things, what would be considered gender discrimination if the employer were not a religious entity.[18]

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[13] Again, the fact that the religious broadcaster does not operate for profit is critical to Americans United's position on this point.

[14] *See* CLS Comments at 6.

[15] *See Boyd v. Harding Academy of Memphis*, 88 F.3d 410, 414 (1996).

[16] *Id.* at 411.

[17] *Id.* at 415.

[18] See 42 U.S.C. sec. 2000e(k).

In addition, CLS's assertion that "discrimination on the basis of religion impedes the hiring process and constricts the likelihood of getting the broadest pool of qualified applicants"[19] is spurious and offensive. Under CLS's rationale, there would be no need for Title VII or any other law prohibiting discrimination in employment since discrimination would work against the employer's economic self-interest and not occur. In reality, religious broadcasters are competing in the economic marketplace with non-religious broadcasters that are required to adhere to anti-discrimination laws, giving religious broadcasters a distinct economic advantage.

Finally, it is not the case that religious broadcasters are under represented in today's broadcast marketplace. CLS's Comments imply broad based discrimination against religion. However, there is no evidence of a lack of diversity or discrimination against religious broadcasters. In fact, the number of stations carrying religious programing has increased dramatically, and the 1999 Directory of Religious Media lists 1,616 radio stations and 242 television stations that currently report carrying religious programing.[20] Therefore, it is absurd to suggest that religious broadcasters are, themselves, the object of discrimination.

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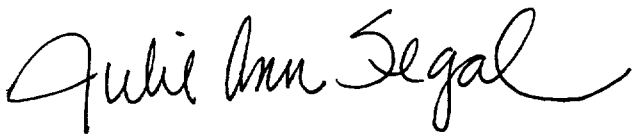
[19] CLS Comments at 18.

[20] Christian Media Source Book, *1999 Directory of Religious Media*, National Religious Broadcasters. Furthermore, CLS implies that, unless broadcasters can discriminate in their hiring, religious programs may not be aired, thereby hampering diversity. *See id.* at 19. Contrary to CLS's claims, however, there is no connection between the availability of religious programming and a legal definition regarding hiring practices.

Conclusion

For the aforementioned reasons, we urge the Commission to reconsider its definition of "religious broadcaster," and to reject the addition of commercial broadcasters to the category of religious broadcasters that are permitted to discriminate on the basis of religion in their employment.

Respectfully submitted,



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